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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D., 1966

No. 841

COUNTRY MUTUAL INSURANCE COMPANY, Bloomington, Illinois,

(Defendant-Appellant), Petitioner,

vs.

GUSTAV ANDEEN, Administrator of the Estate of Gustav K. Andeen, deceased; CONSTANCE ANDEEN, Executor of the Will of August Robert Carlson, Deceased,

(Plaintiffs-Appellees), Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT.

Country Mutual issued its insurance policy to Gustav Andeen wherein Country Mutual insured Andeen and any occupants of his motor vehicle against injuries caused by an uninsured motorist. The policy provided that if

any person injured by an uninsured motorist and the company could not agree as to the liability of the uninsured motorist or as to the amount of the damages then "upon written demand of such person or upon written demand of the Company, the matter * * * shall be settled by arbitration". The policy also provided that no injured person should prosecute his claim to judgment against the uninsured motorist "without the written consent of the Company". (Abst. 7, 10; Rec. 449, 452)

While this policy was in force, on September 22, 1963, an uninsured motorist named Roxlau struck a vehicle driven by Andeen, killing Andeen's father-in-law August Carlson and so seriously injuring Andeen's father (Gustav K. Andeen) as to confine him to his bed until his death on May 5, 1965. Andeen's son and daughter were also seriously injured. The evidence showed that Roxlau was intoxicated and caused the collision when he ran a stop sign. He later entered a plea of guilty to reckless homicide. (Abst. 62, 63; Rec. 504, 505)

Plaintiffs were unable to arrive at any settlement with Country Mutual and any claims they had under the Illinois dram shop law would have expired within one year of the collision (1963 Ill. Rev. Stat., c. 43, sec. 135), that is, on September 22, 1964. Consequently, on September 14, 1964, plaintiffs filed their dram shop actions and also filed suit against Roxlau to recover damages for the death of August Carlson and for the injuries to Andeen's father Gustav K. Andeen.

Notice of this action was given to Country Mutual by the following letter: (Abst. 12; Rec. 454)

"Country Mutual Insurance Co.
Bloomington, Illinois September 14, 1964
Gentlemen:

Enclosed please find copies of complaints which we have this day filed in the Rock Island County Circuit Court and which arise out of the collision between your insured Gustav Andeen and John Roxlau at 30th Street and 31st Avenue, Rock Island, Illinois, on September 22, 1963. According to our information, Mr. Roxlau did not have any insurance.

Very truly yours,
Eagle & Eagle
By /s/ Edw. L. Eagle, Jr."

Country Mutual did not reply to this letter. It made no demand for arbitration under its policy and it took no steps to defend the action against the uninsured motorist Roxlau.

The suit against Roxlau was set for trial. Plaintiffs gave Country Mutual notice of the setting and asked Country Mutual's consent to proceed to judgment against Roxlau by the following letter: (Abst. 16, 17; Rec. 458, 459)

"Country Mutual Insurance Company
Bloomington, Illinois October 16, 1964
Gentlemen:

Re Andeen v. Roxlau, No. 64-L-1221
Andeen v. Baltzer, No. 64-L-1222
Andeen v. Baltzer, No. 64-L-1223

As you know, we filed complaints in the above entitled cases on September 14, 1964. I cannot recall whether I sent you copies of the summons along with the complaints, but in any event I am enclosing copies of the summons with this letter.

The suit against Roxlau has been set for hearing on October 30, 1964 at 2:30 P.M. At that time we

will ask that judgment be entered against him and we hereby request your written consent thereto.

Very truly yours,
Eagle & Eagle
By /s/ Edw. L. Eagle, Jr.
Edw. L. Eagle, Jr."

ELEJ:ls
Encs.

Country Mutual did not reply to this letter although on page 8 of its Petition it acknowledges receipt of both letters. It made no demand for arbitration under its policy and took no action to defend the suit against Roxlau.

At the hearing on October 30th plaintiffs presented evidence both as to the circumstances of the collision and as to the damages, and following the presentation of this evidence the circuit court entered a judgment against Roxlau in favor of Gustav K. Andeen in the amount of $45,000 and also a judgment against Roxlau for the death of August Carlson in the amount of $31,251.75. (Abst. 64; Rec. 506)

Thereafter, plaintiffs filed the present suit against Country Mutual. Country Mutual filed a motion to dismiss based on the ground that it had not consented to the entry of the judgments against Roxlau. This motion was denied. In a memorandum opinion the circuit court pointed out that even though Country Mutual had been given notice of the suit against Roxlau it failed to demand arbitration under its policy and also failed to defend the suit against Roxlau. (Abst. 21, 22; Rec. 463, 464) On May 10, 1965, after this ruling, Country Mutual filed a demand for arbitration and stay of proceeding which was denied by the circuit court on the ground that it came too

late and after a judgment had been entered which was binding upon Country Mutual both as to liability and damages, the two matters which had been subject to arbitration. (Abst. 52; Rec. 494)

Country Mutual then filed an answer denying that Roxlau was negligent, denying that plaintiffs were injured, and denying that Roxlau was uninsured. Country Mutual also demanded a jury trial. The cause proceeded to trial before the court without a jury and plaintiffs presented full evidence as to the circumstances of the collision and their damages. Roxlau testified that he had no insurance on the vehicle which he was operating at the time of the collision. (Abst. 57, 58; Rec. 499, 500) Country Mutual did not object to proceeding without a jury at the time the trial commenced (Abst. 50-53; Rec. 492-495) and at the conclusion of the evidence both plaintiffs and Country Mutual made motions for judgment as a matter of law. (Abst. 37, 40; Rec. 479, 482) The only evidence presented by Country Mutual was the testimony of an adjuster that he had offered to settle all claims for $16,000 some eleven months after the collision. (Abst. 64; Rec. 506) The circuit court allowed plaintiffs' motion for judgment as a matter of law and entered judgments against Country Mutual for $60,000, the limits under Country Mutual's policy. (Abst. 41; Rec. 483)

Country Mutual raised no question in the circuit court that any of its constitutional rights were violated by the denial of its demand for arbitration, nor did it raise any question under the constitution with reference to its jury demand.

Country Mutual took an appeal to the Appellate Court of Illinois, Third District. On this appeal, Country Mutual

contended that its demand for arbitration should have been allowed and also that it was error to proceed to trial in the face of its written jury demand. It raised no question that any of its rights under the federal constitution had been violated.

The Appellate Court rendered a written decision which appears in the appendix to the petition for certiorari, pages 3 through 11. In said opinion, the Appellate Court made a full and fair statement of the facts. Also, the Appellate Court answered squarely the various points raised by Country Mutual.

The Appellate Court held that Country Mutual had no right to arbitrarily refuse its consent to the entry of judgment against the uninsured motorist, on the authority of *Levy* v. *American Automobile Ins. Co.*, 31 Ill. App. 2d 157, 164; 175 N.E. 2d 607. The Appellate Court further held that if Country Mutual had desired arbitration it should have made a written demand therefor in accordance with the terms of its policy; that Country Mutual made no demand for arbitration between the date of the collision on September 22, 1963, and the date that the judgments were entered against the uninsured motorist over a year later on October 30, 1964; and that once these judgments were entered they became binding upon Country Mutual both as to the liability of the uninsured motorist and as to the damages under the authority of *Wert* v. *Burke*, 47 Ill. App. 2d 453, 456; 197 N.E. 2d 717.

As to the jury demand, the Appellate Court held that Country Mutual waived its right to a jury trial by proceeding to trial before the court without raising the point, on the authority of *People* v. *Czaszewicz*, 295 Ill. 11, 128 N.E. 739. The Appellate Court also noted that there was

a serious question as to whether there was any question of fact for a jury to pass upon. In other words, the judgments against the uninsured motorist settled any question as to his liability and as to the damages. In the subsequent suit against the insurance company the only question of fact still open was whether or not Roxlau was uninsured. On this point, Roxlau was the sole witness and he testified specifically that he had no insurance on his vehicle which would cover the injuries to the plaintiffs. (Abst. 57, 58; Rec. 499, 500) Consequently, there was no conflict in the evidence to submit to a jury.

Following the decision by the Appellate Court, Country Mutual filed a petition for leave to appeal to the Supreme Court of Illinois. The sole ground urged in the Supreme Court (pages 2 and 3 of petition for leave to appeal) was that the claims should have been arbitrated. As was true in both the circuit court and Appellate Court, no claim was made that any constitutional right was infringed by the denial of arbitration.

No point whatsoever was raised in the Supreme Court of Illinois with reference to the jury demand.

The Supreme Court of Illinois denied Country Mutual's petition for leave to appeal and Country Mutual has filed its petiton for writ of certiorari to this Court. The first suggestion ever made in this case that any constitutional questions might be involved appears in this petition for certiorari. No constitutional questions were raised or passed upon by the circuit court, the Appellate Court or the Supreme Court of Illinois.

INACCURACIES IN PETITION FOR WRIT OF CERTIORARI.

1. At pages 2 and 8 of the petition it is stated that the insured Gustav Andeen was killed in the collision. However, the insured was not even injured in the collision. His father was injured and subsequently died, as the Appellate Court correctly noted in its opinion, page 4 of appendix to petition. This error is probably due to a similarity in names.

2. At page 9 of the petition it is stated that in the suit against the uninsured motorist the circuit court heard evidence "on damages only". This is inaccurate. The circuit court heard not only the evidence on the damages but on the circumstances of the collision—the fact that the uninsured motorist ran a stop sign, was intoxicated with a blood alcohol count of .181 and later entered a plea of guilty to reckless homicide. This was properly noted by the Appellate Court in its opinion wherein it stated (page 5 of appendix to petition):—

> "At the hearing in the Circuit Court of the suit against Roxlau, evidence was presented fully both as to the circumstances of the collision and as to the damages."

3. At page 9 of the petition it is stated that the circuit court entered judgment of $30,000 plus recoverable items on both estates. This is not accurate. Judgment of $30,000 plus recoverable items was entered in favor of the estate of August Carlson, but the insured's father Gustav K. Andeen was still living at the time of the trial and the circuit court entered judgment for him to cover

his personal injuries in the amount of $45,000. These facts are accurately noted in the Appellate Court's opinion, page 5 of appendix to petition.

4. At pages 9 and 11 of the petition for certiorari it is stated that trial without a jury against Country Mutual was had over Country Mutual's protest. This is not accurate. Country Mutual proceeded to trial before the court without any protest whatsoever (Abst. 50-53; Rec. 492-495) and only after the trial had been in progress for some time did Country Mutual call the circuit court's attention to its jury demand. The facts are accurately noted in the Appellate Court's opinion (appendix to petition, page 10) wherein that Court states:—

> "Country Mutual Insurance Company proceeded to trial before the court without raising the point, which in itself would constitute a waiver of a jury trial. (*People* v. *Czaszewicz,* 295 Ill. 11, 128 N.E. 739.)"

5. At page 12 of the petition it is stated that whether or not Roxlau was uninsured was a question of fact which should have been submitted to a jury. This is not accurate. Roxlau himself was called to the stand and he testified expressly and explicitly that he had no insurance on his vehicle which would cover the injuries which he caused. (Abst. 57, 58; Rec. 499, 500) No evidence or witness whatsoever was presented to the contrary and consequently there was no conflict in the evidence to present to a jury. The Appellate Court was quite cognizant of this situation because it noted in its opinion, page 10 of appendix to petition:—

> "There is a serious question as to whether there was any question of fact upon which a jury could pass in the case."

6. At page 2 of the petition it is stated that there are "no other opinions" other than that of the Appellate Court. This is not correct, because the circuit court filed a memorandum opinion which was specifically referred to by the Appellate Court in its opinion (page 6 of appendix to petition):—

> "In a memorandum opinion, the Circuit Court pointed out that Country Mutual Insurance Company had been given notice of the suit against Roxlau and of the hearing date but did nothing. The court stated that Country Mutual should either have consented to have the matter decided by the court, or if it desired arbitration, it should have demanded arbitration."

7. At page 3 of the petition it is stated that Country Mutual was deprived of certain constitutional rights when the Supreme Court of Illinois held "for the first time in this case" that Country Mutual was not entitled to arbitration or a jury trial. This is not accurate.

The circuit court specifically denied Country Mutual's demand for arbitration on the ground that it came too late and this ruling was affirmed by the Appellate Court. If any constitutional question arose by reason of the denial of arbitration, it arose in the circuit court and Country Mutual raised no constitutional question in the circuit court and the circuit court decided no such question.

The same is true with respect to Country Mutual's jury demand. The circuit court held that Country Mutual waived its right to a jury trial by proceeding to trial before the court without a jury; that there was no conflict in the evidence for a jury to pass upon; and that both plaintiffs and Country Mutual moved that the circuit court decide the case as a matter of law. If any

constitutional question arose, it necessarily arose in the circuit court and yet Country Mutual failed to raise any such question in the circuit court and no such question was decided by that court.

The Illinois Supreme Court did not deprive Country Mutual of any constitutional rights with respect to its jury demand because in its petition for leave to appeal to the Supreme Court of Illinois Country Mutual's sole point of contention was with reference to arbitration. It made no point or contention whatsoever in the Supreme Court of Illinois with reference to its jury demand.

ARGUMENT.

The accident in question occurred on September 22, 1963, and judgment was not entered against the uninsured motorist until October 30, 1964. Under Illinois authority, this judgment was binding upon Country Mutual both as to the liability of the uninsured motorist and as to the damages. Thereafter, suit was filed against Country Mutual and Country Mutual filed a motion to dismiss on the ground that it had not consented to the judgment against the uninsured motorist. This motion was denied by the circuit court in a memorandum opinion wherein the circuit court pointed out that Country Mutual had been given notice of the suit against the uninsured motorist and had been requested to give its consent to the entry of judgment against said motorist, that Country Mutual should either have consented or it should have demanded arbitration, but it did neither. It was only after this memorandum opinion was filed that Country Mutual made its demand for arbitration (May 10, 1965) and said demand was denied on the ground that it came too late and after a binding judgment had been entered against the uninsured motorist. This ruling was affirmed in the Appellate Court, and the Supreme Court of Illinois denied a petition for leave to appeal from said ruling. No question was raised that this ruling deprived Country Mutual of any constitutional rights in the circuit court, in the Appellate Court or in the Supreme Court.

Likewise, the circuit court ruled that Country Mutual had waived its jury demand by proceeding to trial be-

fore the court without objection; that inasmuch as the undisputed evidence was that the motorist in question (Roxlau) had no insurance, there was no conflict in the evidence to submit to the jury; and all parties had invited the circuit court to decide the question by filing motions asking the court to decide the question as one of law. The circuit court's ruling on this point was affirmed by the Appellate Court and Country Mutual then abandoned the point in the Supreme Court of Illinois by confining its petition for leave to appeal solely to the matter of arbitration.

We submit that Country Mutual failed to preserve any constitutional questions which may have been involved by failing to raise such questions in the circuit, Appellate and Supreme Court of Illinois. See *Ker* v. *California*, 374 U.S. 23, 10 L. ed. 2d 726, 83 S. Ct. 1623, where the ruled is stated as follows (L. ed. 744):—

> "Ordinarily '[w]e do not reach for constitutional questions not raised by the parties,' *Mazer* v. *Stein*, 347 U.S. 201, 206, 98 L. ed. 630, 636, 74 S. Ct. 460 note 5 (1954), nor extend our review beyond those specific federal questions properly raised in the state court. The record gives no indication that the issue was raised in the trial court or in the District Court of Appeal, the latter court did not adjudicate it and we therefore find no reason to reach it on the record."

Not only is it necessary to raise a constitutional question in order to preserve said question for review, but it is also necessary to obtain a decision thereon. In the instant case, Country Mutual did neither; it raised no constitutional question in the Illinois courts and obtained no decision on any constitutional question. See *Beck* v.

Washington, 369 U.S. 541, 8 L. ed. 2d 98, 82 S. Ct. 955, where this Court stated (L. ed. pg. 109):—

> "Assuming arguendo that for the purposes of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided by the Washington Supreme Court, the argument cannot be entertained here under an unbroken line of precedent. E. g., *Ferguson* v. *Georgia*, 365 U.S. 570, 572, 5 L. ed. 2d 783, 785, 81 S. Ct. 756 (1961); *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248, 46 L. ed. 171, 176, 22 S. Ct. 120 (1902)."

We further respectfully submit that this record presents no federal question of substance. Country Mutual failed to demand arbitration within a reasonable time. In fact it waited for over a year after the collision and until after a binding judgment was entered. When it finally did demand arbitration, there was nothing left to arbitrate. If Country Mutual had made a timely demand for arbitration prior to the time judgment was entered against the uninsured motorist, and if said demand had been rejected by the circuit court, then we would have a different situation, but these are not the facts in this case.

Likewise, with reference to the jury demand, Country Mutual proceeded to trial before the circuit court without objection, it filed a motion asking the circuit court to decide the question as one of law and, furthermore, there was no dispute in the facts presented to the circuit court and consequently nothing for a jury to pass upon. If there had been a dispute in the facts and Country Mutual had made a timely objection, we might have a different situation. But, in any event, Country Mu-

tual wholly failed to present any question as to its jury demand to the Supreme Court of Illinois.

We submit that the record in this case discloses no federal question of substance and there are no special and important reasons to grant a review on writ of certiorari, as required by Rule 19 of this Court. See *Wolf* v. *Weinstein*, 372 U.S. 633; 10 L. ed. 2d 33, 83 S. Ct. 969 (page 39 of L. ed.):—

> "Oral argument brought into sharper focus than was apparent at the time we granted the writ that the controversy over the stock interests primarily implicates questions of Pennsylvania law and presents no federal question of substance. In the circumstances, the writ of certiorari as to that judgment of the Court of Appeals is dismissed as improvidently granted. Cf. *The Monrosa* v. *Carbon Black, Export Inc.*, 359 U.S. 180, 183, 184, 3 L. ed. 2d 723, 725, 726, 79 S. Ct. 710."

Finally, we respectfully suggest that the decision below rests on adequate state grounds. See *Jankovich* v. *Indiana Toll Road Comm.*, 379 U.S. 487, 13 L. ed. 2d 439, 85 S. Ct. 493, wherein this Court stated (L. ed. page 441):—

> "It is undoubtedly '"the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210, [80 L. ed. 158, 159, 56 S. Ct. 183].' *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 281, 7 L. ed. 2d 285, 288, 82 S. Ct. 275."

In this case, Country Mutual arbitrarily refused to consent to the prosecution to judgment of the suit against the uninsured motorist. The Illinois courts held that a

party to a contract cannot deliberately prevent the performance of a condition of the contract and then take advantage of said party's own wrongful conduct and assert the failure of the fulfillment of the condition to defeat liability under the contract. For Illinois and other authorities supporting this rule see *Levy* v. *American Automobile Ins. Co.*, 31 Ill. App. 2d 157, 164 (relied on by the Appellate Court) and also *Foreman Tr. & Sav. Bank* v. *Tauber*, 348 Ill. 280, 285; *Eggan* v. *Simonds*, 34 Ill. App. 2d 316, 320; *Goldstein* v. *Rosenberg*, 331 Ill. App. 374; Williston on Contracts, 3rd ed., Vol. 5, sec. 677, page 224; Restatement of Contracts, sec. 295; 17 Am. Jur. 2d Vol. 17, Contracts, sec. 427; 12 I.L.P., Contracts, sec. 385; 17-A C.J.S. Contracts, sec. 468.

Country Mutual made no written demand for arbitration until after judgment was entered against the uninsured motorist, more than one year following the accident. Under Illinois law Country Mutual had a right to intervene in and defend the suit against the uninsured motorist and since it failed to do so it became bound by the judgment both as to the liability of the uninsured motorist and the damages. Consequently, when it finally made its demand to arbitrate there was nothing left to arbitrate because the arbitration clause of the contract provides for arbitration only of the questions of liability and damages. For Illinois authority supporting this position see *Wert* v. *Burke*, 47 Ill. App. 2d 453; 197 N.E. 2d 717; and *Lamb* v. *Horwick*, 48 Ill. App. 2d 251; 198 N.E. 2d 194.

As to its jury demand, Country Mutual proceeded to trial before the court without objection and this constitutes a waiver of the right to trial by jury. See *People*

v. *Czaszewicz,* 295 Ill. 11, 15, 16. Since there was no dispute in the evidence for a jury to pass on, there was no error in failing to call a jury. See *Continental Ill. Nat. Bank* v. *Cardwell,* 287 Ill. App. 227, 252. Finally, since all parties moved for judgment as a matter of law the circuit court was invited to decide the matter as a question of law. See *Allen* v. *Meyer,* 14 Ill. 2d 284, 292.

As to the authorities cited in the petition for writ of certiorari, counsel cites *Rosenbaum* v. *American Surety Co. of N.Y.,* 11 N.Y. 2d 310, 183 N.E. 2d 667, as holding that the question of whether the other driver is insured should be submitted to a jury, and of course that is true where there is a dispute in the evidence. But in the case at bar the other driver was called to the stand and testified specifically that he had no insurance. Country Mutual presented no evidence to the contrary, and consequently there was no issue of fact to submit to a jury.

Counsel also cites *Kirouac* v. *Healey,* 181 Atl. 2d 634, as authority that plaintiffs should either have obtained the insurance company's consent to proceed to judgment against the uninsured motorist, or plaintiffs should have asked for arbitration. While this is correct as a general proposition, this decision is not authority that an insurance company may arbitrarily withhold its consent and thereafter defeat its liability by reason of its own arbitrary and wrongful conduct. In the case at bar, the plaintiffs gave notice of their suit against the uninsured motorist and requested the company's consent to proceed to judgment. The circuit court found that the company's failure to consent was arbitrary, and that finding was expressly affirmed by the courts of review in Illinois.

Under the authorities cited above, the company should not be permitted to take advantage of its own arbitrary conduct in order to defeat liability.

Counsel also cites *Niazi* v. *St. Paul Mercury Ins. Co.*, 121 N.W. 2d 349, and *Reconstruction Finance Corp.* v. *Harrisons & Grosfield Ltd.*, 204 F. 2d 36, to the effect that arbitration may be demanded long after the controversy arises. However, those cases are readily distinguishable from the case at bar because in neither of said cases had a binding judgment been entered at the time of the demand for arbitration, whereas the demand in the instant case was made after the entry of a binding judgment. Country Mutual was given notice of the suit against the uninsured motorist, it had a right under Illinois law to defend said suit and failed to do so, and consequently the judgment against the uninsured motorist was binding on Country Mutual both as to liability and damages. Country Mutual's demand to arbitrate, made after the entry of a binding judgment, was made at a time when there was nothing left to arbitrate.

CONCLUSION.

The petition for writ of certiorari should be denied for the following reasons:—

1. No constitutional question was raised in the courts of Illinois;
2. No constitutional question was decided by the Illinois courts;
3. No substantial federal question is involved;
4. The decision of the Illinois courts rests upon adequate state grounds.

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